No. SC 85740

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.*
ST. LOUIS COUNTY, MISSOURI*, et al.*,
Relators

v.

THE HON. DAVID LEE VINCENT, III,
Judge, Circuit Court of St. Louis County, Missouri,
Respondent

Petition for Writ of Prohibition

Reply Brief of Relators St. Louis County, *et al*.

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ARGUMENT

A. There is no consent by the sovereign to suits based on an implied contract or equitable principles

Plaintiff Investors Title Company, Inc. ("Investors"), appearing for the Honorable David Lee Vincent, III, Respondent, contends that sovereign immunity does not apply to claims that are based on an implied contract or equitable principles. This is absolutely wrong. This Court has unequivocally stated that the doctrine of sovereign immunity applies to actions based on an implied contract for money had and received, *Gas Service Co. v. Morris*, 353 S.W.2d 645, 647-648 (Mo. 1962) and *Kleban v. Morris*, 247 S.W.2d 832, 837 (Mo. 1952). Sovereign immunity to an action for money had and received may only be waived, and consent to suit be given, by legislative act or constitutional provision. *Kleban* at 837. Plaintiffs who cannot point to express consent for their claim must be dismissed. *Bachtel v. Miller County Nursing Home*, 110 S.W. 3d 799, 804 (Mo. banc 2003). Investors has not done so, and Relators St. Louis County, Missouri ("County"), Janice Hammonds, Recorder of Deeds ("Recorder"), and Norris Acker, Director of Revenue ("Director") (collectively referred to as "County Defendants") are entitled to the writ they seek. *State ex rel.*

Missouri Department of Agriculture v. McHenry, 687 S.W. 2d 178, 182 (Mo. banc 1985).

V.S. DiCarlo Construction Co., Inc. v. State, 485 S.W. 2d 52, 56 (Mo. 1972) does not, as Investors contends, stand for the proposition that "a transaction involving mutual obligations by a state entity creates an implicit waiver of sovereign immunity." The only question that was presented by the appeal in *DiCarlo* was "whether contract rights of a private citizen under a validly executed contract with the State may be asserted and established in a judicial proceeding." *DiCarlo* at 53. According to the pleadings in *DiCarlo*, the General Assembly passed an Act appropriating money for construction of a specific building and the State entered into a formal written contract with V.S. DiCarlo Construction Company to construct it. *Id.* Although the petition consisted of six counts, this Court specifically limited its decision to "the single issue of whether the doctrine of sovereign immunity denies to plaintiff in this case the opportunity to have such contract claims against the State heard and adjudicated. *Id.* The Court did not discuss, much less decide, whether a waiver of sovereign immunity may be implied from a "transaction involving mutual obligations."

In addition to citing *DiCarlo* for a proposition for which it does not stand, Plaintiff ignores *Bachtel v. Miller County Nursing Home*, 110 S.W. 3d

799, 804 (Mo. banc 2003), where this Court held that, in order to waive sovereign immunity, the sovereign's intent to allow itself to be sued must be express rather than implied. "It is the express statement of the legislature's intent to allow itself to be sued . . . that is dispositive." *Id*. Investors does not point to any act of the General Assembly that expresses such an intent. The statutory indication is strongly to the contrary. First, the only obligation to filers imposed on recorders of deeds by the General Assembly is the duty to record certain documents that are tendered with the proper fee. *See* § 59.330 RSMo, providing that it shall be the duty of recorders of deeds to record certain documents, and §59.320 RSMo 2000, providing that the recorder shall not be bound to record documents unless the "fee allowed by law" is tendered. The exclusive remedy created by the General Assembly for damages caused by neglect of a recorder's duties is an action on the official bond of the recorder. §59.650 RSMo 2000. If the General Assembly had intended to allow a suit for refunds of overpayments of recording fees, it would have been easy enough to expressly provide for such a remedy. Second, the General Assembly has specifically prohibited counties from making any contract, unless the contract, including the consideration, is in writing and dated when made, § 432.070 RSMo 2000, and has mandated that no contract or order imposing any financial obligation

on the county is binding unless there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged, § 50.660 RSMo 2000. Sections 432.070 and 50.660 negate any legislative intent to allow a suit on an oral contract or an implied contract. In fact, the only legislative consent to be sued that can be implied from Investors' business transactions with the Recorder is consent to an action on the official bond of the recorder as provided in § 59.650. Count I does not purport to be an action on Recorder's official bond.

Plaintiff also ignores *State of Missouri ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W. 3d 188 (Mo. App. 2003), where the Western District criticized three of the cases on which Plaintiff relies: *Palo v. Stangler*, 943 S.W. 2d 683 (Mo. App. 1997), *Karpierz v. Easley*, 31 S.W.3d 505 (Mo. App. 2000), and *Gavan v. Madison Memorial Hospital*, 700 S.W. 2d 124 (Mo. App. 1985). All three cases misstated the law and ignored binding Supreme Court precedent. *Atwell* at 190-191.

> In *Gavan*, the court held that a hospital was not protected from suit for breach of contract for the hospital's failure to follow its own personnel policies on termination because the suit was essentially a contract claim. . . *Gavan* viewed *DiCarlo* as holding that the State is not protected from suits sounding in

> contract . . . [*DiCarlo*] does not hold that all claims against the state sounding in contract, implied contract, or equity are not barred by sovereign immunity. Rather, *DiCarlo* stands for the proposition that the State does have sovereign immunity generally in contract claims but waived that immunity and consented to be sued when it entered into the contract with DiCarlo Constuction. *Gavan* did not in fact involve an implied contract or invocation of equitable principles but rather an express contract.

Atwell at 190.

Atwell is an accurate statement of the law and a faithful application of this Court's decisions in *Kleban* and *Gas Service*. *See Amicus* Brief of the Attorney General of Missouri at p. 4. In contrast, *Palo*, *Gavan* and *Karpierz* misstate the law and ignore this Court's precedents.

In summary, there is no exception to sovereign immunity for claims "sounding in contract" unless there is an express contract that complies with §§ 432.070 and 50.660 RSMo.

B. There is no consent by the sovereign to suits seeking a refund of overpaid recording fees

Neither *Reidy Terminal v. Director of Revenue*, 989 S.W. 2d 540 (Mo. banc 1995) nor *River Fleets v. Carter*, 990 S.W. 2d 75 (Mo. App. 1999) stand for the general proposition that sovereign immunity does not bar a claim for overpaid fees, as Investors suggests. *Reidy* and *River Fleets* both involved fee overcharges by the Petroleum Storage Tank Insurance Fund, which the General Assembly specifically designated as "non-state funds" to be administered by the department of revenue. *See* §§ 319.129.1 and 319.131.4 RSMo 2000. The Missouri Constitution specifically defines "nonstate" funds as "all taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are hereafter designated as 'nonstate funds' to be administered by the department of revenue." Mo. Const. Art. IV, § 15. The funds in *Reidy* and *River Fleets* fall within the third category of the definition. *Id.* The plaintiffs in *Reidy* and *River Fleets* sought a judgment against the fund itself, not a judgment against the State or any political subdivision of the State. Here, Investors cites a number of state statutes that require that a portion of the

fees collected by the Recorder be transferred to designated funds, including, *inter alia*, the County Employees' Retirement Fund, the Statutory County Recorder's Fund, the Missouri Housing Trust Fund, and the Children's Trust Fund. *See* Respondent's Brief at p. 23. However, Investors does not point to any statute designating any of the special funds as a "non-state fund" to be administered by the department of revenue. *See* Mo. Const. Art. IV, § 15. Moreover, Investors has not sued any designated fund. Instead, Investors seeks monetary damages from County, and should they recover a judgment, it would become a liability of the County. As a result, Investors' reliance on *Reidy* and *River Fleets* is misplaced.

Although there is dicta in *River Fleets* that appears to draw a distinction between taxes and fees for services, the case did not turn on whether the monies paid into the special insurance fund were a tax; it turned on whether the operator was seeking to hold the state liable for the refunds. *River Fleets* at 78. The doctrine of sovereign immunity is based on a public policy to preserve the financial stability and budget planning ability of the governmental entity. *See Community Federal Savings and Loan v. Director of Revenue*, 752 S.W.2d 794 (Mo. banc 1988). A claim for a refund of payments for services has the same effect on the financial stability and budget planning ability of County as a claim for a refund of tax monies.

Once payments reach the public treasury, a suit seeking a money judgment against the sovereign is barred by sovereign immunity. "Where the action is for the recovery of money, held by the state treasury, . . . the state is entitled to invoke its sovereign immunity unless it expressly consents not to do so." *Community Federal* at 796. There is no consent by the sovereign to suits seeking a refund of overpayments for services provided by a recorder of deeds.

C. The rationale for application of sovereign immunity to claims against the public treasury still applies today

Investors' entire argument for abrogation of sovereign immunity is based on *Jones v. State Highway Commission*, 557 S.W. 2d 225 (Mo. banc 1977), a case which has been overturned by the legislature, *see* §537.600.1 RSMo. Only four judges joined in the principal opinion in *Jones*. Judge Donnelly filed a dissent, in which Judges Morgan and Henley concurred. 557 S.W. 2d at 231. The dissent argued that the principal opinion represents a blatant exercise of the legislative function by judges and violates the letter and spirit of Article II, Section 1 of the Constitution of Missouri. *Id.* "The question of abolishing the immunity of the sovereign people is of fundamental importance to our form of government. It should [be] decided by the people or by their elected representatives and not by this Court." *Id.*

The rationale originally supporting the application of sovereign immunity to claims for refunds from the public treasury applies with equal force today. Government budgets are prepared on an annual cash basis. *Community Federal*, 752 S.W. 2d at 797. In the absence of a statutory limitation on the time in which a customer may seek a refund of fees for services, governments would be subject to substantial liabilities for refunds of those fees. *See Community Federal* at 797. The legislature is the proper body to decide whether to authorize a suit for a refund of payments that have reached the public treasury, not this Court.

D. Prohibition is appropriate in this case

A writ is necessary to prevent the Circuit Court from exceeding its jurisdiction by proceeding on Count I, which is barred by sovereign immunity. "Immunity" connotes not only immunity from judgment but also immunity from suit. *State ex rel. Missouri Department of Agriculture v. McHenry*, 687 S.W. 2d 178, 182 (Mo. banc 1985). Immunity claims have jurisdictional aspects. *Id.* Issuance of the writ is appropriate to relieve County Defendants of the burdens of defending Count I. *Id.* Also, this case presents an important question of state wide concern. A writ should be issued to resolve the conflict between *Atwell*, 119 S.W. 3d 188 and *Palo*, 943 S.W. 2d 683.

CONCLUSION

This Court should issue a writ to prevent the Circuit Court from exercising jurisdiction over Count I.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief were mailed, postage prepaid, this 30th day of April, 2004 to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains 2,638 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 14-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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